

STATE OF MICHIGAN
COURT OF APPEALS

HOWARD ZIMMERMAN,

Plaintiff/Counter Defendant-
Appellee,

v

PATRICK VINCENT BELL,

Defendant/Counter Plaintiff-
Appellant.

UNPUBLISHED

May 24, 2012

No. 301740

Cheboygan Circuit Court

LC No. 08-007863-CK

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right the trial court's order granting plaintiff a prescriptive easement and denying defendant's claim for adverse possession. We affirm.

Plaintiff and defendant asserted claims to a strip of land between their respective properties. The land borders Kingsley Beach Drive, which crosses over defendant's property. Plaintiff's father purchased the property in 1956 and eventually built a driveway from Kingsley Beach Road to the lake for easier access to their 150 feet of shoreline. The only other way to access the lake from plaintiff's property is by a pathway from the house to the beach, which poses a risk to older individuals. Plaintiff had to cross a portion of defendant's property to reach the drive. However, defendant's vehicles often blocked plaintiff's access to the drive. Defendant purchased his property in 1996 and, in 2001, he built a house. Defendant built a patio and placed patio blocks in an area where he always parked. It was later determined that this patio encroached on plaintiff's land. In 2008, plaintiff filed an action to quiet title, alleging he had a prescriptive easement to the strip of land he had to cross to access his lake drive. Defendant counter-claimed that he had title by adverse possession to the strip of land where he parked his vehicles.

We review de novo a trial court's decisions in actions seeking equitable relief, including to quiet title and for a prescriptive easement. *Mulcahy v Verhines*, 276 Mich App 693, 698; 742 NW2d 393 (2007). However, the trial court's factual findings are reviewed for clear error. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

First, defendant argues that the trial court erred by granting plaintiff a prescriptive easement. An easement is the "right to use another's land for a specified purpose." *Matthews v*

Dep't of Natural Resources, 288 Mich App 23, 37; 792 NW2d 40 (2010). Acquiring an easement by prescription requires using another's property in a manner that is open, notorious, adverse, and continuous for a period of fifteen years. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000); MCL 600.5801. The party claiming a prescriptive easement has the burden to prove that "the use of the defendant's property was of such a character and continued for such a length of time that it ripened into a prescriptive easement." *Mulcahy*, 276 Mich App at 699.

Here, plaintiff produced sufficient evidence to establish a prescriptive easement. First, plaintiff's use of the property was open and notorious. Since 1957, plaintiff and his predecessor-in-title used Kingsley Beach drive to access the beach. They also built a driveway from Kingsley Beach Road to make it easier to access the shoreline and continue to use that drive today. Second, plaintiff's use was adverse and hostile. "Hostile" is a term of art meaning that the use "is inconsistent with the rights of an owner." *Killips*, 244 Mich App at 259. Consequently, using another's land with permission cannot create a prescriptive easement. *Prose*, 242 Mich App at 679. Further, exclusive use is not required for a prescriptive easement. *Id.* Although plaintiff's deed did not grant him access to use Kingsley Beach Drive, he used the drive as if he owned it. Further, the evidence does not indicate that defendant or his predecessors-in-title ever granted plaintiff permission to cross defendant's property to access the drive. Lastly, plaintiff's use was continuous for 15 years. Therefore, plaintiff established the elements of a prescriptive easement.

Next, defendant argues that the trial court erred by denying his claim for adverse possession. The elements to establish a claim of adverse possession are similar to that for a prescriptive easement except the former requires exclusivity. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). "To establish adverse possession, the person claiming it must show 'clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of 15 years, hostile and under cover of claim of right.'" *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011) (citation omitted).

Defendant is unable to show that his use of the land was adverse. In *DeGroot v Barber*, 198 Mich App 48, 52; 497 NW2d 530 (1993), this Court identified two situations that arise with mistaken boundary lines: "(1) failing to respect the true line, while attempting to do so, and (2) respecting the line believed to be the boundary, but which proves not to be the true line." Stated differently, the distinction is "between erroneously placing a monument, intending to place it on the true line, but failing to do so, and erroneously believing a preexisting monument (either artificial or natural) represents the boundary, and holding to that monument." *Id.*, n 1. The latter establishes a claim of adverse possession, while the former does not. *Id.* at 51-53. The facts here indicate that defendant did not possess the land with hostility. Defendant never had a survey done before he made improvements to the land. Instead, he constructed a patio and placed patio-block pillars on what he believed to be his property. Defendant erroneously placed a monument intending to place it on the true line, but failed to do so. This is not adverse possession. *Id.*

We affirm. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Michael J. Kelly